Supreme Court, U.S.
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No. 95-1910

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

THOMAS R. ZIMMER and SUZANNE K. ZIMMER,
Petitioners,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY OF MICHIGAN, MICHIGAN BELL TELEPHONE COMPANY, COMMUNICATIONS WORKERS OF AMERICA and COMMUNICATIONS WORKERS OF AMERICA LOCAL 4009,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT UNIONS

JAMES B. COPPESS
501 Third Street, N.W.
Suite 800
Washington, D.C. 20001-2797
(202) 434-1207

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Does the six month statute of limitations contained in § 10(b) of the National Labor Relations Act bar a hybrid action for breach of the duty of fair representation and breach of collective bargaining agreements filed more than six months after the plaintiff-employee was told by his union that there was nothing more the union could do with respect to his contract claim?

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National Labor Relations Act:

§ 8 6
§ 10(b) 4, 5, 6

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BRIEF IN OPPOSITION FOR RESPONDENT UNIONS

STATEMENT OF THE CASE

Thomas R. Zimmer was an employee of the Michigan Bell Telephone Company from June 1973 until the end of 1983, when he transferred his employment to the American Telephone & Telegraph Company as part of that company's divestiture of its local telephone operating companies. App. 6. Mr. Zimmer then worked at AT&T until he was laid-off for lack of work in September 1989. *Id.* During this entire time, Mr. Zimmer was employed in bargaining units represented by the Communications Workers of America and covered by collective bargaining agreements between the Union and his employers. *Id.*

Under CWA's collective bargaining agreement with AT&T, Mr. Zimmer had a right to be recalled to employment on a seniority basis should a vacancy occur. App. 6-7. He had similar recall rights under the CWA-Michigan Bell agreement for a period of two years after being laid-off by AT&T. App. 7.[1]

When he was laid-off by AT&T, Mr. Zimmer was given a "termination packet" that included a recall interest form. App. 7. Completing the recall interest form was a prerequisite to being recalled pursuant to the various labor agreements. *Id.* Mr. Zimmer claims to have completed a recall interest form, but AT&T has no record of ever receiving a completed form from him. *Id.*

In September 1991, Mr. Zimmer learned that laid-off employees with less seniority than he had been recalled by Michigan Bell. App. 7. Thereafter, Mr. Zimmer began making inquires about why he had not been recalled to employment at Michigan Bell. *Id.*

In February 1993, Mr. Zimmer requested that CWA file a grievance on his behalf with respect to his recall rights. App. 7-8. After investigating Mr. Zimmer's claim, CWA determined that it lacked merit. R. 5: Affidavit of Richard T. Jordan ¶¶ 6-7. *See* App. 8. On this basis, the Union declined to file a grievance on his behalf. *Id.*

On May 27, 1993, Mr. Zimmer wrote to CWA Representative Richard Jordan inquiring as to whether CWA

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[1] Mr. Zimmer retained recall rights at Michigan Bell pursuant to various agreements among AT&T, its affiliates, and the unions representing employees at those telephone companies. *See* R. 9: Plaintiffs' Response to CWA's Summ. Judg. Mot., Exhibit 1 *United States v. Western Electric Co.*, D.D.C. No. 82-0192, Plan of Reorganization pp. 274-275 (describing these agreements). The district court erroneously refers to these rights as arising from the order in *United States v. Western Electric.* App. 6. However, in this regard, the *Western Electric* order does nothing more than describe agreements reached between the telephone companies and the unions representing their employees. *See* R. 9: Plan of Reorganization pp. 274-275.

would file a grievance on his behalf. R. 27-1: Zimmer to Jordan (May 27, 1993). In this regard, Mr. Zimmer's letter asked:

> As you are aware, many months had elapsed while I waited for some response from AT&T and Michigan Bell. I had hoped that the CWA would arrive at a decision more quickly, but I am still waiting.
>
> Will the CWA file a grievance against AT&T and Michigan Bell on my behalf, followed by arbitration if necessary? [*Id.*]

CWA Representative Jordan responded to this inquiry in a letter received by Mr. Zimmer on June 25, 1993. App. 8. Mr. Jordan's letter to Mr. Zimmer stated:

> I am in receipt of your most recent letter dated May 27, 1993, regarding Michigan Bell and AT&T. Pursuant to all your correspondence and our meeting of March 10, 1993, I have thoroughly investigated this matter.
>
> AT&T has no record that you ever completed a form requesting re-employment with Michigan Bell. Also, I have discussed this matter with Dominic Guadagni concerning the six months issue. Dominic recalls making you aware of a job opportunity with Michigan Bell within six months of your layoff with AT&T which you declined. Enclosed please find copies of the letters from Chuck Sawyer and Dominic Guadagni.
>
> There is nothing else the Communications Workers of America can do on your behalf. [R. 5: Affidavit of Richard T. Jordan, Exhibit A.]

On July 28, 1993, Zimmer again wrote to Mr. Jordan. R. 9: Zimmer to Jordan (July 28, 1993). In this letter, Mr. Zimmer requested "all documentation concerning a grievance I had filed with the CWA just prior to my termination." *Id.* In addition, Mr. Zimmer requested the names, seniority dates, and current employment status of

all employees laid off by AT&T in Michigan during 1989. *Id.* Mr. Jordan did not reply to this letter. App. 8.

The CWA Constitution contains an Internal Appeals Procedure, whereby members of the Union, such as Mr. Zimmer, may appeal a decision not to process a grievance. R. 12: Internal Appeals Procedure, CWA Constitution pp. 24-25, Exhibit to Affidavit of Morton Bahr. The Constitution specifies that appeals under this procedure must be filed in the CWA President's office within sixty days of the challenged decision and must be in writing and signed by the appealing member. R. 12: Internal Appeals Procedure ¶ II 1, CWA Constitution p. 25. Mr. Zimmer did not pursue an appeal under the CWA Procedure. R. 12: Affidavit of Morton Bahr ¶ 7. *See* App. 21.

On February 1, 1994, Mr. Zimmer filed his complaint in this action, alleging the AT&T and Michigan Bell had breached their collective bargaining agreements with CWA and that CWA and Local 4009 had breached their duty of fair representation in handling Mr. Zimmer's request to file a grievance.

The complaint was filed more than seven months after Mr. Zimmer received the letter from CWA Representative Jordan stating that "[t]here is nothing else the Communications Workers of America can do on your behalf." R. 5: Exhibit A to the Affidavit of Richard T. Jordan. The district court, therefore, dismissed Mr. Zimmer's action as barred by the six month limitations period contained in § 10(b) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(b). App. 22. After hearing oral argument on Mr. Zimmer's appeal, the Sixth Circuit affirmed the district court's decision in an unpublished *per curiam* opinion. App. 1-2.

ARGUMENT

1. Mr. Zimmer's petition for certiorari represents little more than a stubborn refusal to accept this Court's decision *DelCostello v. Teamsters*, 462 U.S. 151 (1983).

In *DelCostello*, the Court described the nature of lawsuits, such as that filed by Mr. Zimmer, in the following terms:

> Such a suit, as a formal matter, comprises two causes of action. The suit against the employer rests on § 301, since the employee is alleging a breach of the collective bargaining agreement. The suit against the union is one for breach of the union's duty of fair representation, which is implied under the scheme of the National Labor Relations Act. [*DelCostello v. Teamsters*, 462 U.S. 151, 164 (1983) (footnote omitted).]

And the Court held that this "hybrid § 301/fair representation claim" is governed by the six month limitations period in NLRA § 10(b). *Id.* at 172.

Mr. Zimmer's primary argument is that the *DelCostello* Court was wrong to reach this conclusion, because the Rules of Decision Act requires that the most analogous state statute of limitations be applied whenever a federal statute does not contain a limitations period. Pet. 11-27. The Court rejected this argument in *DelCostello*, 462 U.S. at 159-160 n.13, and it should now be obvious that "a clear majority of the Court [has] rejected such a single path." *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 146 (1987).

Mr. Zimmer's secondary criticism of *DelCostello* is that "29 USC § 160(b) was not written expressly to apply to § 301 hybrid cases." Pet. 27. This is hardly surprising, as Congress did not create the "hybrid § 301/fair representation claim." That claim, or at least its fair representation component, was implied from the National Labor Relations Act by this Court. *DelCostello*, 462 U.S. at

164. The unfair labor practice claims defined in NLRA § 8 are expressly subject to the six month limitations period in § 10(b) of that Act. As this Court has recently observed, "where, as here, the claim asserted is one implied under a statute that also contains an express cause of action with its own time limitation, a court should look first to the statute of origin to ascertain the proper limitations period." *Lampf v. Gilbertson*, 501 U.S. 350, 359 (1991).

2. Aside from challenging a settled precedent that this Court has not indicated it is ready to overturn, the petition for certiorari presents the eminently uncertworthy question: whether there is "a question of fact as to when the statute of limitations commenced" in this case. Pet. i. While the "Questions Presented" portion of the petition suggests that the alleged dispute of fact concerns "the interpretation of a letter," *id.*, the corresponding section of the "Reasons for Granting Petition" ignores altogether the letter received by Mr. Zimmer from the union and instead asserts that the limitations period should be tolled because he "relied on what he thought were genuine internal remedies, and pursuant to that belief, he refrained from suing the Union and his employers." Pet. 11. Whichever it is, the district court was undoubtedly correct in granting summary judgment and the court of appeals was equally sound in affirming that ruling.

On May 27, 1993, Mr. Zimmer wrote to CWA Representative Richard Jordan asking, "Will the CWA file a grievance against AT&T and Michigan Bell on my behalf, followed by arbitration if necessary?" R. 27-1: Zimmer to Jordan (May 27, 1993). And Mr. Jordan responded by informing Mr. Zimmer that "I have thoroughly investigated this matter[,] AT&T has no record that you ever completed a form requesting re-employment with Michigan Bell[, and] . . . [t]here is nothing else the Communications Workers of America can do on your behalf." R. 5: Affidavit of Richard T. Jordan, Exhibit A. Even

now, Mr. Zimmer does not explain how this response could be taken as anything other than an unambiguous refusal to file the grievance requested in his May 27th letter.

Mr. Zimmer argues that the limitations period should be tolled because he "continued seeking his internal Union remedies after he received the June 23, 1993 letter as is evident by his July 28, 1993 letter to the Union requesting grievance information." Pet. 10. However, Mr. Zimmer's July 28, 1993 letter does *not* inquire as to the status of his recall grievance. Instead, that letter requests "all documentation concerning a grievance I had filed with CWA *just prior to my termination.*" R. 9: Zimmer to Jordan (July 28, 1993) (emphasis added).[2] That inquiry obviously could not concern the grievance that Mr. Jordan refused to file over the failure of Michigan Bell to recall Mr. Zimmer *years after* his termination. The President of CWA, in whose office such appeals would be filed under the CWA Constitution, has testified that he never received any appeal from Mr. Zimmer challenging the decision not to file his grievance. R. 12: Affidavit of Morton Bahr ¶ 7. Thus, the district court's refusal to toll the limitations period on these grounds was clearly not an abuse of discretion. *Robinson v. Central Brass Mfg. Co.*, 987 F.2d 1235, 1242 (6th Cir.), *cert. denied*, 114 S.Ct. 92 (1993).

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[2] In another paragraph, Mr. Zimmer's letter goes on to request the names, seniority dates, and current employment status of all employees laid off by AT&T in Michigan during 1989. R. 9: Zimmer to Jordan (July 28, 1993). While this may have related to his recall claim, simply asking for this information hardly constitutes an inquiry concerning the status of his rejected grievance, much less an internal union appeal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES B. COPPESS
501 Third Street, N.W.
Suite 800
Washington, D.C. 20001-2797
(202) 434-1207